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No. _____

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IN THE

Supreme Court of the United States

October Term, 1984

LESLIE R. BARTH; LESLIE R. BARTH ASSOCIATES, P.C., a/k/a BARTH & RICHHEIMER, P.C., LESLIE R. BARTH ORGANIZATION, INC., SOUTHEASTERN REALTY ASSOCIATES, INC., NORTH AMERICAN INVESTMENT RESOURCES, INC., AND BISMARK REALTY CONSULTANTS, INC.,

Petitioners,

against

UNITED STATES OF AMERICA AND PHILIP J. KENNEDY, SPECIAL AGENT, INTERNAL REVENUE SERVICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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November 20, 1984

Questions Presented

In an I.R.S. enforcement action, can corporations be compelled to coerce their employees to forego personal Fifth Amendment rights or compelled to hire a new employee for the purpose of searching the corporations' records and giving testimony to the I.R.S. without asserting a Fifth or Fourth Amendment privilege? The Second Circuit has affirmed an order of the district court compelling petitioners to do so.*

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* The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed. No petitioner corporation has any parent companies, subsidiaries or affiliates.

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No. _____

IN THE

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LESLIE R. BARTH; LESLIE R. BARTH ASSOCIATES, P.C., a/k/a BARTH & RICHHEIMER, P.C., LESLIE R. BARTH ORGANIZATION, INC., SOUTHEASTERN REALTY ASSOCIATES, INC., NORTH AMERICAN INVESTMENT RESOURCES, INC., and BISMARK REALTY CONSULTANTS, INC.,

Petitioners,

against

UNITED STATES OF AMERICA AND PHILIP J. KENNEDY, SPECIAL AGENT, INTERNAL REVENUE SERVICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Leslie R. Barth, Leslie R. Barth Associates, P.C. a/k/a Barth & Richheimer, P.C., Leslie R. Barth Organization, Inc., Southeastern Realty Associates, Inc., North American Investment Resources, Inc., and Bismark Realty Consultants, Inc., respectfully request that this Court issue a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Opinions Below

The April 18, 1984 Order of the United States District Court for the District of Connecticut and the May 2, 1984 ruling on Respondents' Motion for Stay by the District Court are reported at 84-1 U.S.T.C. ¶9466 (1984). The opinion of the United States Court of Appeals for the Second Circuit contained in the Appendix (1a) has not yet been reported.

Jurisdiction

The opinion of the United States Court of Appeals for the Second Circuit sought to be reviewed was filed on October 1, 1984. No separate judgment was filed.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional Provisions and Statutes Involved

The basic statute governing the enforcement of Internal Revenue Service Summonses is 26 U.S.C. § 7604. This petition addresses the rights of petitioners under the Fourth and Fifth Amendments to the Constitution in an enforcement proceeding. The statute and constitutional provisions are printed in the Appendix hereto.

Statement of the Case

The order appealed from, issued by the District Court for the District of Connecticut (Cabranes, J.), resulted from the Government's petition to enforce five Internal Revenue Service summonses issued in the course of an investigation of the alleged failure of Leslie R. Barth and corporate petitioners to file income tax returns. The order would require the following:

> ". . . [B]arth shall produce the federal and state corporate tax returns specified in the summonses or testify under oath before this court that he did not possess them on the date of the summons or at any time thereafter, at a hearing to be held on Monday, May 7, 1984 at 10:00 a.m. [a date stayed pending this appeal].

* * *

> . . . [R]espondent corporations shall designate, and if necessary, shall appoint, an agent or agents who shall, having made such inquiry as is necessary in the circumstances, appear in person on Monday, May 7, 1984, at 11:00 a.m., [a date stayed pending this appeal] before the Internal Revenue Service agents at the United States Courthouse, 450 Main Street, Hartford, Connecticut, to testify for the corporations in response to the summonses, without invoking their personal privileges against self-incrimination, and shall furnish such information as is available to the corporations."

The order is final and appealable. *Reisman v. Caplin*, 375 U.S. 440 (1964).

The Second Circuit reversed that portion of the order requiring Mr. Barth to produce (presumably nonexistent) corporate tax returns or to testify as to their nonexistence. Relying on this Court's opinions in *United States v. Rylander*, 460 U.S. 752 (1983); *Curcio v. United States*, 354 U.S. 118 (1957); and *Hoffman v. United States*, 341 U.S. 479 (1951), the Court held that Mr. Barth cannot, consistently with the Fifth Amendment, be compelled to testify to prove nonpossession, and remanded the proceeding to the District Court to determine the validity of Mr. Barth's response to the summonses in the light of that holding.

The Second Circuit affirmed, however, that part of the order directing the petitioner corporations to appoint, and if necessary, hire an agent to testify without invoking the Fifth Amendment. In so holding, the Court noted that its opinion conflicts with that of the Fifth Circuit in *United States v. Hankins*, 565 F.2d 1344 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979), which puts the burden on the Government to subpoena witnesses. The Second Circuit did not address petitioners' argument that to force them to hire an agent solely for the purpose of searching the corporate records and inquiring of corporate employees who have already asserted their Fifth Amendment rights, would violate the Fourth

Amendment. That Court's opinion is in conflict with this Court's recent opinion in *United States v. Jacobson*, 104 S.Ct. 1652, 1656 (1984), and with the opinions of many circuit courts.

This petition requests that the Court grant the writ with respect to the portion of the District Court's order that was affirmed on appeal. A summary of relevant portions of the procedural history is set forth below.

Procedural History

In January, February and March, 1981, five Internal Revenue Service summonses were served upon Leslie R. Barth in his capacity as president of the five petitioner corporations. The investigation related to the alleged failure to file individual and corporate income tax returns. Petitioners produced voluminous documents in response to the summonses.

On November 1, 1982, Mr. Barth appeared for an interview with Special Agent John Fagan as required by the summonses. On behalf of the corporations, he answered every one of a large number of production and authentication questions except that he asserted his personal Fifth Amendment privilege in refusing to answer questions about the existence of the corporate tax returns and in refusing to answer substantive questions. The Government has never complained about any of the answers that Mr. Barth gave but disputed Mr. Barth's right to assert his personal Fifth Amendment privilege with respect to its inquiry into the existence of file copies of the returns. Although the Government admitted that it had no records that any corporate tax returns had been filed for the years in question, it nevertheless pressed for personal testimony about copies of such returns from Mr. Barth.

At a hearing the District Court asked the corporations to produce a list of its employees who had knowledge of and could testify about the corporations' records and affairs for the years

under investigation. The corporations produced a list of six names. Each of these persons advised the Court through personal counsel that he or she would refuse to testify and would assert the Fifth Amendment privilege against self-incrimination. During the District Court proceedings, these claims of privilege were accepted by the parties as valid, and the Court was not asked to hear evidence or to make findings about them.

The Government thereafter asked the Court to compel the corporations to require an employee to testify or to hire a new employee to search the files and testify, without asserting any constitutional privilege. This request was accepted by the Court.

The two part order referred to above was then granted, with a further order that disobedience would lead to immediate imprisonment of Mr. Barth and a $1000 daily fine against Mr. Barth and daily fines of $5000 against the corporations.

As noted above, the order was affirmed in part and reversed in part by the Second Circuit, which thereafter agreed to stay its mandate pending this petition for certiorari.

Ripeness

At the outset, it must be observed that the significant constitutional issues that arise in this case present themselves in an unusual procedural posture. The corporations' duty to hire an agent may come about only if the District Court finds that no current employee with knowledge is willing to testify without invoking his or her rights under the Fifth Amendment. This petition is, nonetheless, ripe. If petitioners fail to seek Supreme Court review at this time, they will probably be deemed to have forgone their right to raise these issues at a later time. *See Burlington Northern, Inc. v. United States*, 459 U.S. 131, 103 S. Ct. 514, 519 n.5 (1982); *Federal Trade Comm. v. Minneapolis-*

Honeywell Regulator Co., 344 U.S. 206, 211-12 (1952).*

Reasons for Granting the Writ

This case involves a conflict between federal courts of appeals on important constitutional issues which have not been, but should be, settled by this Court. In addition, the opinion of the Second Circuit is inconsistent with a recent decision of this Court. For these reasons, which are set forth in more detail below, the writ should be granted.

POINT I

That Part of the Order Requiring Petitioner Corporations to Hire an Agent, Essentially a Policeman, Solely for the Purpose of Searching Petitioners' Corporate Files and Testifying Thereon, Violates Petitioners' Rights Under the Fourth Amendment

Absent certain exigent circumstances, it is well-established that the Fourth Amendment requires that a search of private property be based on probable cause and be accompanied by a warrant when that search is conducted by a state official or by an individual acting as "an 'instrument' or agent of the state." *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). This requirement does not apply to searches by individuals acting in a wholly private capacity. *Burdeau v. McDowell*, 256 U.S. 465 (1921).

. In *United States v. Jacobson*, 104 S.Ct. 1652 (1984), this Court

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*The rule set forth in *Minneapolis-Honeywell* is: "Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew." 344 U.S. at 211-12.

has recently clarified the circumstances in which a private individual will be deemed an agent of the Government. The Court there stated that the Fourth Amendment is "wholly inapplicable 'to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.'" *Id.* at 1656 (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)).

Both *Jacobson* and *Walter* dealt with the issue of the constitutionality of a government search subsequent to a private search that had earlier been conducted with no governmental participation or knowledge. Neither case considered a situation such as this one, in which the Government is ordering a search by a private individual. Not satisfied with the documents that have been produced, and potentially unable to find a corporate employee who is able to testify without invoking his personal Fifth Amendment privilege, the Government is attempting to have an agent appointed to search the files and to testify about them. Even though the corporation is to select the new employee, since this individual will of necessity have no personal knowledge of the relevant facts, his or her purpose amounts to a search of the files for law enforcement officials, and should require the procedures guaranteed by the Constitution. There could be no clearer case of a private individual acting as a government agent. As a consequence, the Second Circuit's opinion is implicitly in conflict with the decisions of this Court.

Moreover, federal courts of appeals have held that a search by a private individual constitutes state action when that individual is acting under instructions from the Government. *See United States v. Bennett*, 729 F.2d 923 (2d Cir. 1984) (holding no state action where informant committed illegal act counter to

his instructions from law enforcement officials); *United States v. Walther*, 652 F.2d 788 (9th Cir. 1981) (holding former Government informant to be state agent where informant opened a package that he thought to contain illicit drugs in expectation of Government award).

The Second Circuit's reliance on *United States v. Kordel*, 397 U.S. 1 (1970), was misplaced. In that case, this Court held that, in a situation in which a corporate employee with knowledge is available to answer interrogatories without invoking the Fifth Amendment, the corporations cannot thwart the investigation by appointing an individual who will assert the privilege. The Court distinguished that situation from the "troublesome" one in which no one can answer the interrogatories without risking self-incrimination. *Id.* at 9-10. It is that troublesome situation that this petition addresses.

Because of the importance of this issue and because the opinions of this Court lead to the conclusion that the order affirmed by the Second Circuit violates the Fourth Amendment, the writ should be granted. The writ should further be granted in the interest of justice.

POINT II

That Part of the Order Requiring Petitioner Corporations to Appoint an Agent to Testify Without Invoking His Fifth Amendment Rights Is in Direct Conflict with an Opinion of the Fifth Circuit and Runs Counter to the Policies of the Fifth Amendment

The District Court's order requires that the corporations bear the burden of producing a knowledgeable employee to testify without invoking the Fifth Amendment or, if no such person is available, to hire an agent to investigate and testify about what

knowledge he acquires. It was argued above that the second of these alternatives violates the corporations' rights under the Fourth Amendment. Here it will be shown that the first alternative is inconsistent with the Fifth Amendment, and the Second Circuit's affirmance of it is in direct conflict with an opinion of the Fifth Circuit.

In *United States v. Hankins*, the Fifth Circuit was confronted with a similar order. In that case, the District Court issued an order enforcing an I.R.S. summons that required Hankins Lumber Company, Inc. "to appoint an individual who was conversant with the books and records, who would not claim the Fifth Amendment privilege, to appear and testify as to those books and records." 565 F.2d at 1348. Observing the unprecedented nature of the order, the Fifth Circuit reversed:

> The government has made no showing of its inability to ascertain who kept the books, records, and papers for the corporation in this comparatively small operation in a small city in the year 1973. If the Internal Revenue Service wishes such testimony it should use its own resources to subpoena any person likely to have the requisite information and let them claim the privilege if they so desire. Moreover, we do not know how Hankins could compel the attendance of a witness, nor do we see how the Constitution would allow him to speak for the strictly personal right of any individual to claim the privileges of the Fifth Amendment. *Id.* at 1350.

The arguments motivating the Fifth Circuit in *Hankins* apply with equal force here. Neither Mr. Barth nor the corporate petitioners has any control over the assertion of privilege by any employee. While the corporations can assist the Government by supplying the names of individuals with knowledge of the relevant facts (a task the corporations have done), it is inconsistent with the policies underlying the Fifth Amendment to require the

corporations to intrude into the personal privileges of their employees.

In this case, the Second Circuit rejected the *Hankins* holding, saying:

> . . .we cannot accept the fifth circuit's suggestion in *Hankins* that since the IRS has the resources to individually subpoena a corporation's employees, it is somehow improper to place the burden on the corporation to come forward with an employee or agent who can supply the requisite information. Slip op. at 6511 (8a).

If employees refuse to cooperate, the Second Circuit reasons, then the corporations can always hire an agent. But as argued in Point I, *supra*, the second alternative of the order runs afoul of the Fourth Amendment. Moreover, contrary to the position taken by the Second Circuit, a corporate respondent in an I.R.S. summons enforcement action should not be placed in risk of contempt because its employees have asserted their constitutional rights. While the Second Circuit would allow "the intensity of the corporations' efforts" to be a factor in a later contempt proceeding, slip op. at 6511 (9a), a corporation should not be held in contempt for failure to take on the Government's responsibility of running the investigation.

Because of this conflict between federal courts of appeals on such important constitutional issues which have not been, but should be, settled by this Court, the writ should be granted.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Dated: New York, New York
November 20, 1984

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1443 August Term 1983

(Argued: June 12, 1984 Decided: Oct. 1, 1984)

Docket No. 84-6131

UNITED STATES OF AMERICA *and*
PHILIP J. KENNEDY,
Special Agent, Internal Revenue Service,
Petitioners-Appellees,

—against—

LESLIE R. BARTH; LESLIE R. BARTH ASSOCIATES, P.C., a/k/a BARTH & RICHHEIMER, P.C.; LESLIE R. BARTH ORGANIZATION, INC.; SOUTHEASTERN REALTY ASSOCIATES, INC.; NORTH AMERICAN INVESTMENT RESOURCES, INC.; *and* BISMARK REALTY CONSULTANTS, INC.,
Respondents-Appellants.

Before:

VAN GRAAFEILAND, WINTER, and PRATT, *Circuit Judges.*

Opinion of the United States Court of Appeals
for the Second Circuit

PRATT, *Circuit Judge:*

Respondents, Leslie R. Barth and five corporations of which he is president, appeal from an order of the United States District Court for the District of Connecticut, José A. Cabranes, *Judge*, enforcing five Internal Revenue Service (IRS) summonses pursuant to 26 U.S.C. § 7604(b) (1982). We reverse in part and affirm in part.

I.

During the course of an investigation of Barth's alleged failure to file corporate and personal federal income tax returns for the years 1976 through 1980, the IRS served five administrative summonses on Barth individually and in his capacity as president of the five respondent corporations. The summonses directed Barth and the corporations to turn over described corporate records, as well as copies of each corporation's state and federal income tax returns. Although Barth gave many of the corporate records to the IRS, the government considered Barth's compliance incomplete and petitioned the district court in August 1982 for an order enforcing the summonses pursuant to 26 U.S.C. § 7604(b).

Barth's partial compliance left two unresolved issues which were the subject of several proceedings before the district court, and which ultimately were addressed in the enforcement order appealed from. Those issues were: (1) whether the court should order Barth to turn over copies of the corporate income tax returns; and (2) whether the court should order the corporations to provide a witness who could testify about the corporate records.

As to Barth, the district court ordered:

> Barth shall either *produce the* summoned corporate tax *returns or testify* under oath before this court that he did not possess them on the date of the summons, or at any time thereafter, ***. (Emphasis added).

As to the corporations, the district court ordered:

> [R]espondent corporations *shall designate, and if necessary,*

> *shall appoint, an agent* or agents *who shall*, having made such inquiry as is necessary in the circumstances, appear in person *** to *testify* for the corporations in response to the summonses, *without invoking their personal privileges against self-incrimination*, and shall furnish such information as is available to the corporations. (Emphasis added).

Judge Cabranes denied a motion to stay the enforcement order, but we stayed the district court's order pending argument and resolution of this appeal.

II.

Section 7602 of the Internal Revenue Code authorizes the IRS to examine records, to issue summonses, and to take testimony for the purpose of "determining the liability of any person for any internal revenue tax." 26 U.S.C. § 7602 (a); *United States* v. *Euge*, 444 U.S. 707, 710-11 (1980). Before the district court may enforce an IRS summons the government must demonstrate: (1) that the summons was issued for a proper purpose; (2) that the material sought is relevant to that purpose; (3) that the information sought is not already within the commissioner's possession; and (4) that all administrative steps have been followed. *United States* v. *Powell*, 379 U.S. 48, 57-58 (1964). Once the government establishes these four factors the burden in an enforcement proceeding shifts to the party challenging the summons to show why it should not be enforced. *United States* v. *Davey*, 543 F.2d 996, 1000 (2d Cir. 1976).

In the case at bar, respondents do not challenge the *Powell* showing made by the government. Instead, respondents attack the scope of the enforcement order, claiming that it went beyond mere enforcement of the IRS summonses. Under the order, Barth's only alternative to producing the corporate income tax returns was to testify, under oath, that he did not possess the returns. Barth contends this violates his fifth amendment privilege against self-incrimination. Similarly, the order required more of the corporations than production of documents; it directed them to designate or appoint an agent, who would not invoke

a fifth amendment privilege, to testify about the corporate records.

A. BARTH

Reversing the position it took in the district court, the government has acknowledged on appeal that we must vacate that part of the enforcement order that requires Barth to testify. Barth is being investigated for failure to file individual and corporate federal income tax returns. An admission that he did not possess these returns would "furnish a link in the chain of evidence needed to prosecute [Barth] for a federal crime", *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951), and therefore, would be potentially self-incriminating. Accordingly, under *Curcio* v. *United States*, 354 U.S. 118, 123-28 (1957), Barth's testimony that he did not possess the returns could not constitutionally be compelled, and we must vacate that portion of the order that directs him to testify. *See United States* v. *Rylander*, 103 S.Ct. 1548, 1554 (1983); *see also United States* v. *Edgerton*, 734 F.2d 913, 920-21 (2d Cir. 1984).

Barth further argues that we must vacate that portion of the order directing him to produce the corporate tax returns since he does not possess them and is therefore unable to comply. The government responds that after striking the alternative direction to testify we should affirm the district court's order as modified, because Barth failed to establish his non-possession defense below. According to Barth, the corporations have admitted through answers to interrogatories that no returns of the corporations were filed, and the government's records show that no such returns were received. This circumstantial evidence, he urges, establishes that no returns existed and, therefore, that he could not possibly possess them.

If properly established, nonpossession of summoned documents is a valid defense to an IRS application for an enforcement order. *United States* v. *Rylander*, 103 S.Ct. at 1552. Issuance of an enforcement order constitutes an adjudication that the respondent possesses and is able to produce the summoned documents at the time the order is issued. Thereafter, the respondent must produce the documents or face contempt proceedings in which he is foreclosed from claiming nonposses-

sion at the time of the enforcement order. *Id.* at 1554. Because of its potentially drastic consequences, however, an enforcement order in a contested proceeding should not rest on a determination of possession that is merely implicit. Before ordering production on penalty of contempt, the district court should expressly determine that the respondent possesses the summoned documents.

Here, the district court made no finding of possession. Instead, it issued an alternative order – produce the documents or testify that you do not possess them – that was apparently designed to defer determination of the critical contested issue of possession. Such an alternative procedure is not contemplated by the statute as interpreted in *Rylander.* Moreover, to merely delete the direction to testify, as the government urges, and thereby leave standing an order to produce containing an implicit finding of possession, would in effect deprive Barth of a proper ruling on the possession issue. On the other hand, the issue of possession, on which Barth bears the burden of proof, is too complex and fact-sensitive for resolution by an appellate court on the simplistic analysis tendered by Barth.

We therefore vacate that part of the enforcement order directed to Barth and remand the proceeding to enable Judge Cabranes to rule explicitly on Barth's defense of nonpossession based on the present record and on any additional relevant evidence the parties may wish to present. If Judge Cabranes finds that Barth possesses the returns, then enforcement may be granted; if he determines that Barth does not possess them, then enforcement should be denied.

B. THE CORPORATIONS

After the government filed its petition for enforcement, Barth, who was president of each corporation, refused on self-incrimination grounds to testify about what corporate books were kept or who was responsible for keeping them. Barth's attorney did agree, however, to furnish the government with a list of employees who had knowledge about the records.

Nevertheless, after that list was furnished, the listed employees appeared by counsel who informed the government and the court that each

employee intended to invoke his personal privilege against self-incrimination in response to any question asked about the corporate records. At the court's suggestion, government counsel agreed that it would accept an affidavit supplied by the employees' counsel showing: (1) that he had interviewed each employee; (2) that each had a reasonable fear of incrimination; and (3) that each employee intended to assert the privilege.

But when counsel for the employees furnished the affidavit, it stated only that he had interviewed the employees and that each employee intended to assert the fifth amendment privilege. It did not state that their fears of self-incrimination were reasonable, nor did it supply any facts to show that the claims of privilege were valid.

At this point, government counsel argued that the affidavit was inadequate to support each employee's claim of the fifth amendment privilege and that even if the affidavit were sufficient to excuse all the employees from testifying, the corporations still could not escape their duty to comply with the summonses. As a potential solution, the government suggested that the corporations be required to appoint an agent, free of self-incrimination problems, who could testify about the corporate records.

Judge Cabranes finally ordered that the corporations

> shall designate, and if necessary, shall appoint, an agent or agents *** to testify for the corporations *** without invoking their personal privileges against self-incrimination***.

On appeal from this part of the enforcement order the corporations argue that the court lacked authority: (1) to order the corporations to force a current employee to give up a valid claim of the fifth amendment privilege against self-incrimination, *United States* v. *Hankins*, 565 F.2d 1344, 1350 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979); and (2) to force the corporations to appoint a new employee to testify on behalf of the corporations.

The corporations' first challenge fails because it rests on the assumption that the district court found that the affidavit filed by the employees' counsel was sufficient to support their assertion of the fifth

amendment privilege. Our reading of the transcript of the December 1983 hearing on this issue and of the district court's subsequent written order discloses that Judge Cabranes did *not* find that counsel's affidavit was sufficient to establish the employees' claims of privilege. Had he done so he would not have ordered the corporations to either designate an existing agent or to appoint a new agent to testify.

Furthermore, Judge Cabranes's order does not directly affect the employees, nor does it force them to claim surrender what may be valid fifth amendment claims. As we interpret the order, it simply directs the corporation to comply with the summonses by producing someone to testify about records, all, or nearly all, of which have already been produced. From the proceedings before Judge Cabranes, it appears that the "someone" could be any knowledgeable employee, or alternatively, a new agent appointed by the corporations for the purpose. The basic obligation of the corporations is to make every reasonable effort to obey the summonses. *See United States v. Euge*, 444 U.S. at 712-13. If corporate employees do appear before the court in response to a request or direction by their employer, they still would have their personal privileges against self-incrimination which, if asserted, can be tested for validity at that time.

We also reject the corporations' second claim that the alternative direction to appoint a new agent exceeded the court's authority. Unlike a corporation's individual officers and employees, a corporation itself possesses no fifth amendment privilege. *Curcio v. United States*, 354 U.S. at 122. Because of its continuing duty to respond to an IRS summons, a corporation may be required to supply a new agent should all existing employees refuse to testify on self-incrimination grounds. *Cf. United States v. Kordel*, 397 U.S. 1, 8-9 (1970). Despite the corporations' claim that the procedure was not feasible, it appears to be the only way in which the corporations might satisfy their obligation to testify should all of their employees successfully assert their fifth amendment privileges.

Respondents' reliance upon *United States v. Hankins*, 565 F.2d at 1350, is misplaced. There, the fifth circuit reversed an order directing the president of a corporation to designate an employee to give testi-

mony without invoking a fifth amendment privilege. The fifth circuit stated that it did not know how the president could compel the attendance of a witness nor did it see how the constitution would allow him to speak for the strictly personal right of any individual to claim the privileges of the fifth amendment.

In the case at bar, these problems are easily resolved. First, the corporations could have subpoenaed the employees to testify in the enforcement proceeding in support of the corporations' defense. Even though they did not do that, the corporations could still request their employees to serve as witnesses as part of their duties. If the employees refuse, the alternative order permits the corporations to appoint an agent solely for the purpose of reviewing the company records and testifying about them. It makes little sense to argue that the corporations could not compel the agent's attendance when that would be the essence of his job responsibilities.

Second, the order does not seek to have Barth or the corporations waive any personal privileges of either existing employees or of an agent appointed pursuant to the order. Whether the privilege is asserted is still left to the employee and whether it will be upheld is left for future determination by the court. If all current employees successfully assert a fifth amendment privilege, the corporations must appoint an agent who will testify without asserting the privilege. But this does not contemplate a waiver of fifth amendment rights. All it requires is that they appoint someone who has no previous connection with the corporations which might place him in a position where his testimony about the records could result in self-incriminating statements.

Finally, we cannot accept the fifth circuit's suggestion in *Hankins* that since the IRS has the resources to individually subpoena a corporation's employees, it is somehow improper to place the burden on the corporation to come forward with an employee or agent who can supply the requisite information. To the contrary, we regard this as part of a corporation's continuing duty to respond to an IRS summons.

It is possible that after reasonable, bona fide efforts the corporations might be unable to supply either an employee or an agent willing and able to provide the necessary information. If so, the court may

weigh the intensity of the corporations' efforts along with other relevant circumstances in any subsequent contempt proceeding.

As demonstrated by the history of this particular proceeding, there is no natural division between an IRS enforcement proceeding and a contempt proceeding. Some issues raised in opposition to an IRS summons, like abuse of process, or nonpossession of documents, are best raised at the enforcement stage. *See, e.g., United States* v. *O'Henry's Film Works, Inc.*, 598 F.2d 313, 319-20 (2d Cir. 1979) (abuse of process); *United States* v. *Rylander*, 103 S.Ct. at 1552 (nonpossession). Still others, like substantial compliance, or present inability to comply, are particularly suited to the contempt stage. *See United States* v. *Young*, 532 F. Supp. 334, 335 (E.D. Mich. 1981), *modified*, 718 F.2d 1101 (6th Cir. 1983), *cert. denied*, 104 S.Ct. 1678 (1984) (substantial compliance); *United States* v. *Rylander*. 103 S.Ct. at 1554 (present inability to comply).

However, some issues resist categorization and could properly be raised at either stage. We believe that the district court possesses broad discretion to determine when these issues should be addressed. In the order appealed from, Judge Cabranes has elected to defer to a later time a determination of whether there are any knowledgeable employees who will testify without asserting their privilege against self-incrimination, and whether under the circumstances it is feasible to supply the corporations' testimony through a newly appointed agent. While some or perhaps all of these issues might have been resolved by the enforcement order, we find no error in the procedure adopted and therefore affirm the order as to the corporations.

III.

That part of the order appealed from that is directed to Barth is reversed and remanded for further proceedings in accordance with this opinion. That part of the order appealed from that is directed to the corporations is affirmed.

Oral Order of the United States District Court for the District of Connecticut Requiring Mr. Barth to Testify, December 12, 1983

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. H-82-1138

UNITED STATES OF AMERICA, *et. al.*,

Petitioners,

v.

LESLIE R. BARTH, *et al.*,

Respondents.

December 12, 1983

Before the Hon. Jose Cabranes, U.S.D.J.

I shall expect that Leslie R. Barth shall produce the federal and state corporate – state corporate income tax returns of the respondent corporations for the years 1976 through 1980 by January 3, 1984. And if the respondent Leslie R. Barth fails or refuses to produce the returns by that date, he shall be fined one thousand dollars each day thereafter and be imprisoned from that date, until such time as he complies with the order of this Court by producing the federal and state income tax returns of the respondent corporations for the years 1976 through 1980.

Transcript, December 12, 1983, pages 52-53.

Order of the United States District Court for the District of Connecticut Vacating Oral Order, December 19, 1983

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. H-82-1138

UNITED STATES OF AMERICA *and*
PHILIP J. KENNEDY,
Special Agent, Internal Revenue Service,
Petitioners,

v.

LESLIE R. BARTH; LESLIE R. BARTH ASSOCIATES, P.C. a/k/a BARTH & RICHHEIMER, P.C.; LESLIE R. BARTH ORGANIZATION, INC.; SOUTHEASTERN REALTY ASSOCIATES, INC.; NORTH AMERICAN INVESTMENT RESOURCES, INC.; *and* BISMARK REALTY CONSULTANTS, INC.,
Respondents.

December 19, 1983

ORDER

The court, wishing to consider further certain questions in the captioned case, and wishing to review the transcript of the hearing of December 12, 1983, which transcript is not yet available, hereby vacates its order delivered orally at that hearing. After further consideration of the full record of the case, the court will issue a memorandum setting forth its decision in due course.

Order of the United States District Court
for the District of Connecticut Vacating
Oral Order, December 19, 1983

It is so ordered.
Dated at Hartford, Connecticut, this 19th day of December 1983.

/s/ José A. Cabranes

José A. Cabranes
United States District Judge

Ruling of the United States District Court for the District of Connecticut, April 18, 1984

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. H-82-1138

UNITED STATES OF AMERICA *and*
PHILIP J. KENNEDY,
Special Agent, Internal Revenue Service,
Petitioners,

v.

LESLIE R. BARTH; LESLIE R. BARTH ASSOCIATES, P.C. a/k/a BARTH & RICHHEIMER, P.C.; LESLIE R. BARTH ORGANIZATION, INC.; SOUTHEASTERN REALTY ASSOCIATES, INC.; NORTH AMERICAN INVESTMENT RESOURCES, INC.; *and* BISMARK REALTY CONSULTANTS, INC.,
Respondents.

April 18, 1984

RULING ON PETITIONERS' APPLICATION FOR AN ORDER OF CONTEMPT AND TO ENFORCE ORDER OF COURT AND ORDER

On September 2, 1983, in its continuing effort to enforce compliance with five Internal Revenue Service summonses which had issued in the course of an investigation of the tax liabilities of Leslie R. Barth ("Barth"), the Government submitted to the court a proposed order which included three pages of findings of fact and sought to hold Barth and all of the above-named respondent corporations in contempt of court.

At a hearing held December 12, 1983, after oral argument on the Government's application for an order, the court entered an oral ruling

Ruling of the United States District Court for the District of Connecticut, April 18, 1984

in substantial, although not complete, conformity with the order proposed by the Government on September 2, 1983. *See* Certified Official Transcript of Hearing of December 12, 1983 (filed Dec. 19, 1983) ("T. 12/12/83") at 41, 42, 52-55.

Wishing to consider further the legal questions presented and to review the full record of this action, on December 19, 1983 the court issued an order which vacated the order delivered orally at the hearing of December 12, 1983 and stated that, after further consideration, the court would issue a written ruling.

First, with respect to Barth, the Government's application presents the question whether, in a failure-to-file investigation, a custodian of corporate documents may shelter his failure to produce federal and state corporate income tax returns which are the subject of a lawfully-issued Internal Revenue Service summons by claiming his personal privilege against compelled self-incrimination under the Fifth Amendment. The court concludes that he may not, for reasons which are set forth below. Therefore, Barth shall produce the federal and state corporate tax returns specified in the summonses or testify under oath before this court that he did not possess them on the date of the summons or at any time thereafter, at a hearing to be held on Monday, May 7, 1984, at 10:00 a.m.

Secondly, with respect to respondent corporations, the Government's application presents the question whether, when an Internal Revenue Service summons issues against a corporation, the corporation is obligated to appoint an agent who can testify on behalf of the corporation, without fear of self-incrimination. The court concludes that a corporation does have such an obligation. Accordingly, respondent corporations shall appoint such an agent or agents, who, having made such investigation as may be necessary, shall appear to testify before the investigating agents at the United States Courthouse, 450 Main Street, Hartford, Connecticut, on Monday, May 7, 1984, at 11:00 a.m., in order to furnish such information as is available to the corporations pursuant to the summonses.

Ruling of the United States District Court
for the District of Connecticut, April 18, 1984

A. BARTH

The Government contends that under the doctrine of *United States v. O'Henry's Film Works*, 598 F.2d 313 (2d Cir. 1979), Barth must either produce the federal and state income tax returns which are called for by the summonses or give sworn testimony that he did not possess them on the date of the summons or at any time thereafter. *See* Petitioners' Memorandum of Law Submitted with Proposed Order ("Plaintiffs' Memorandum"), attached to Letter from D. Patrick Mullarkey to the undersigned, dated Sept. 2, 1983, at 5.

Barth responds, in essence, that since this is a failure-to-file investigation, an admission that he did not possess copies of the income tax returns would be "so directly self-incriminating" as to violate his Fifth Amendment rights. T. 12/12/83 at 14-15. Barth's argument appears to be that to require, in lieu of production, sworn testimony that he did not possess the corporate income tax returns, would, because of the nature of the investigation, directly inculpate him:

> MR. ELSEN: ***Now, of course, they're asking for a file copy of the return and not asking for proof that they filed – you know, a letter of transmittal to the IRS. But I would submit that the difference is so narrow there that it's of no practical consequence. Because a case can be made by the Government simply putting into evidence their records showing no return in question, plus an admission by this individual as an officer of this corporation that he has no file copy.

T. 12/12/83 at 15.

Respondents' counsel seeks to distinguish the facts of the instant case from those of *O'Henry's Film Works*, in which the corporate president refused to produce the cash register tapes and cash register reconciliation statements, as follows:

Ruling of the United States District Court for the District of Connecticut, April 18, 1984

> MR. ELSEN: [I]f you produced the cash record of a corporation in response to a summons and you say you have produced all of these records, that in itself does not make you liable for a crime. The IRS might be able to use this to investigate the corporation and the like, but it doesn't deal with the matter which is uniquely personal, which is the individual's own personal responsibility.
>
> And when you go to the president of a corporation and you say – I mean suppose they had gone to him and said, "Look, did you personally make sure that this corporation filed a tax return and did you file it," and if he says no, that's a case, that's the end of it.

T. 12/12/83 at 15-16.

As respondents' counsel himself conceded, "this is a very metaphysical kind of argument in many ways." T. 12/12/83 at 13. It is also singularly unpersuasive. Although the fact of Barth's non-possession of the corporate tax returns might arguably have some testimonial value, it would clearly not be as inculpatory as counsel suggests, for it is hardly equivalent to an admission that no tax returns were filed because none exist. Respondents' counsel suggests that the proposition "no returns were filed because non exist" is the only inference possible from the proposition that Barth did not possess the tax returns on the date of the summons or thereafter. That suggestion is clearly wrong.

Barth also contends that to testify under oath to his non-possession of the corporate tax returns would be as inculpatory to him as similar testimony would have been for the defendant in *United States v. Karp*, 484 F. Supp. 157 (S.D.N.Y. 1980). Whether *Karp* is good law is subject to doubt. In any event, as Judge Knapp stated in *Karp*, in refusing to

order a sole proprietor to produce all documents in his possession prepared by others and relating to the operation of his business,

> *[a]ssuming (as we actually believe to be the case) that the documents do not exist*, the only way the defendant could avoid the risk of being jailed for contempt would be to assert their *nonexistence*, which is precisely the fact the the Government wishes to establish at trial .... Defendant Karp .... would be faced with the option of incriminating himself through his testimony of non-possesion or being held in criminal contempt. It is a purpose of the Fifth Amendment to avoid this dilemma.

484 F. Supp. at 159 (emphasis supplied). Quite apart from the difference between "nonexistence" and "non-possession," which Judge Knapp did not address in *Karp*, that case involved documents of a sole proprietorship, rather than a legal entity with and existence separate and distinct from the agent required to produce its records. It is thus readily distinguishable on its facts from the instant case.

It is well established that an individual cannot rely on a personal privilege against self-incrimination to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if those records might incriminate him personally. *Wilson v. United States*, 221 U.S. 361, 377 (1911) (corporation); *Wheeler v. United States*, 226 U.S. 478 (1913) (dissolved corporation); *Grant v. United States*, 227 U.S. 74 (1913) (dissolved corporation); *United States v. White*, 322 U.S. 694 (1944) (unincorporated labor union); *United States v. Fleischman*, 339 U.S. 349 (1950) ("an association ... under investigation" by Congressional committee); *Rogers v. United States*, 340 U.S. 367 (1951) (political party in municipality); *Curcio v. United States*, 354 U.S. 118 (1957) (local labor union); *McPhaul v. United States*, 364 U.S. 372 (1960) (political organization); *Bellis v. United States*, 417 U.S. 85 (1974) (dissolved law partnership); *United States v. Shlom*, 420 F.2d 263 (2d Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970) (corporation owned by single shareholder); *United States v. Richardson*,

469 F.2d 349 (10th Cir. 1972) (Subchapter S corporation).

As the Supreme Court stated in *Bellis*,

> [i]n view of the inescapable fact that an artificial entity can only act to produce its records through its individual officers or agents, recognition of the individual's claim of privilege with respect to the financial records of the organization would substantially undermine the unchallenged rule that the organization itself is not entitled to claim any Fifth Amendment privilege and largely frustrate legitimate government regulation of such organization.

417 U.S. at 90.

Barth's obligations fall squarely within the doctrine of *United States v. O'Henry's Film Works, Inc.*, *supra*, which follows the generally accepted principle that a corporate agent has a duty to produce the organization's records even where the records might incriminate the corporation or the agent, if a valid summons or subpoena for those records has issued. 598 F.2d at 316. In *O'Henry's Film Works*, our Court of Appeals held that

> the duty of the putative custodian of an organization's records extends beyond mere production or nonproduction: when the agent fails to produce documents that are the subject of a valid summons or subpoena, if called before a court he must give sworn testimony that he does not possess them. The agent's statement that he does not possess the records at issue is merely part of his duty to comply with a lawful demand for them.

Id. at 318. The agent's testimony in this regard is unprivileged, and to testify to nonpossession does not waive the agent's personal privilege in regard to other questions about the records. *Id.* at 318. *See also Securities Investor Protection Corporation v. Executive Securities Corporation*, 433 F. Supp. 470, 474 (S.D.N.Y. 1977) (custodian of corporate records may not claim personal Fifth Amendment privilege for fail-

ing to produce subpoenaed corporate records, but "must state. . . under penalty of perjury, either that he does not have possession of the subpoenaed records and is not the custodian of such records or that he has another valid excuse for failing to produce them").

Accordingly, Barth shall either produce the summoned corporate tax returns or testify under oath before this court that he did not possess them on the date of the summons, or at any time therafter,[1] at a hearing to be held on Monday, May 7, 1984, at 10:00 a.m.

B. *THE CORPORATIONS*

The Government has pressed its application to have respondent corporations held in contempt for their failure to comply with the summonses by testifying through an agent about the records specified in the summonses. T. 12/12/83 at 7, 18. Respondent corporations answer that as a matter of law, they cannot be held in civil contempt for failing to testify. They assert, first, that they have not been ordered to testify through an agent; and second, that even if they had been so ordered, it is impossible for them to comply since all persons with knowledge of the corporate records will claim their personal privilege against self-incrimination, and respondent corporations are powerless to coerce putative corporate agents to waive their personal constitutional privileges in order to testify. *See* Respondents' Supplemental Memorandum of Law in Opposition to Government's Proposed Order (filed Dec. 12, 1983), 1-3, 6-7.

After a thorough review of the record, the court concludes that respondents' first contention is correct, although the second is subject to doubt. At the hearing of November 22, 1982, the court granted the Government's Petition to Enforce Five Internal Revenue Service Summonses to the extent indicated on the record of the hearing. *See* Endorsement Order on Government's Petition to Enforce Five Internal Revenue Service Summonses (entered Nov. 23, 1982). Specifically, the court ordered respondents to provide the Government with a list of persons who could testify as agents of the corporations:

Ruling of the United States District Court for the District of Connecticut, April 18, 1984

THE COURT: Why don't we shortcircuit this, Mr. Elsen. Why don't you provide a list to the Government of all persons who might conceivably be able to speak to these matters. Obviously, in doing so you can take some days and give notice to the persons whose names you are going to give the Government so that they are aware that their names are being given to them. And that will give them an opportunity to take whatever action they deem appropriate even in this very early stage of the matter.

MR. ELSEN: All right. We will do that.

THE COURT: Then Mr. Toscher will do what, Mr. Toscher?

MR. TOSCHER: Well, if they provide myself or the Special Agent with the list of any of the individuals who will appear on behalf of the corporations, that person should appear in response to the summons, I'm sure a time could be worked out. Counsel have been working together, there's been no problem there.

THE COURT: And I assume that that will happen, that you will be able to do that informally and that we will have no need to come back here to deal with the matter.

MR. ELSEN: I would hope so, because Mr. Toscher comes from Washington, and we come from New York.

Certified Official Transcript of Hearing of November 22, 1982 (filed Jan. 5, 1983) ("T. 11/22/82") at 8-9, 17, 19, 27. While it was the court's understanding, and apparently that of counsel for the Government, that one or another of the persons designated would appear to testify for the corporations, it is nonetheless true that respondents, having supplied the Government with a list of persons who "might conceivably be able

to speak to these matters," complied with the letter, if not the spirit, of the court's order of November 22, 1982. Accordingly, it is arguable that they cannot now be held in contempt of court.

The Government, relying on the decision of the Supreme Court in *United States v. Kordel*, 397 U.S. 1, 8 (1970), argues that respondent corporations are obliged to designate an agent to testify on behalf of the corporations without claiming his personal privilege against self-incrimination, since to permit all possible agents to invoke the privilege would be, in effect, to permit the corporation to take advantage of a privilege to which it is not entitled. *See also United States v. Springfield Rare Coin Galleries, Inc.*, No. 82-3362 (C.D. Ill. July 7, 1983) (order). In *Kordel*, which involved a corporation's duty to respond to interrogatories, the Court stated,

> [t]o be sure, service of the interrogatories obliged the corporation "to appoint an agent, who could, without fear of self-incrimination, furnish such requested information as was available to the corporation." The corporation could not satisfy its obligation under Rule 33 simply by pointing to an agent about to invoke his constitutional privilege. "It would indeed be incongruous to permit a corporation to select an individual to verify the corporation's answers, who because *he* fears self-incrimination may thus secure for the corporation the benefits of a privilege it does not have." Such a result would effectively permit the corporation to assert on its own behalf the personal privilege of its individual agents.

397 U.S. at 8 (footnotes omitted), *quoting United States v. 3963 Bottles . . . of "Enerjol Double Strength,"* 265 F.2d 332, 336 (7th Cir.), *cert. denied*, 360 U.S. 931 (1959).

Since corporations can only act through agents, it follows that when a summons or subpoena is lawfully issued against a corporation, the corporation must respond to that summons or subpoena through an agent. Although respondents have attempted to show that various persons with knowledge of the corporate records would invoke their constitutional privilege against self-incrimination, *see, e.g.*, Affidavit of Peter

L. Zimroth (filed Sept. 16, 1983), nothing in this record suggests, much less demonstrates, that respondent corporations cannot appoint an agent who, after making appropriate inquiry to apprise himself of the facts, will testify without invoking his privilege against self-incrimination in order to furnish to the investigating agents the information available to the corporations.

Respondents rely on *United States v. Hankins*, 565 F.2d 1344, 1350 (5th Cir. 1978), *cert. denied*, 440 U.S. 909 (1979), for the proposition that if the Internal Revenue Service wishes to obtain testimony from individuals other than Barth, who might have knowledge of the corporate records, "it should use its own resources to subpoena any person likely to have the requisite information."

It is clearly the corporations' responsibility, however, to testify in response to the summonses through one agent or another. The court has been shown no reason why the corporations should not designate an agent to testify before the Internal Revenue Service agents in the same way they would be obliged to testify if named in a subpoena *ad testificandum* under Rule 30(b)(6), Fed.R.Civ.P.[2] *See* 8 C. Wright and A. Miller, Federal Practice and Procedure, §§ 2103, 2110 (1970). Contrary to the decision in *Hankins* (which does not bind this court),[3] to require the Government to subpoena all possible putative corporate agents personally despite the fact that summonses had lawfully issued against the corporations would be an egregious misallocation of burdens. It would also gravely impede legitimate government regulation of corporate enterprises by allowing corporations effectively to avoid testifying in response to summonses and subpoenas.

Accordingly, lest there be any further doubt about respondent corporations' obligations, the five summonses shall be enforced against respondent corporations as follows: respondent corporations shall designate, and if necessary, shall appoint, an agent or agents who shall, having made such inquiry as is necessary in the circumstances, appear in person on Monday, May 7, 1984, at 11:00 a.m., before the Internal Revenue Service agents at the United States Courthouse, 450 Main Street, Hartford, Connecticut, to testify for the corporations in response to the summonses, without invoking their personal privileges against self-incrimination, and shall furnish such information as is available

to the corporations.

For the time being, therefore, the Government's application for an order holding respondents in contempt is denied. However, the Clerk shall set down on the calendar a hearing for Tuesday, May 8, 1984 at 10:00 a.m. If any of the respondents have not complied with their legal obligations as specified and ordered herein, this court will not hesitate to enter findings of contempt and impose appropriate sanctions upon a renewed application by the Government at that time.

Leslie R. Barth shall be present in person at the hearings scheduled for May 7 and May 8, 1984.

The Clerk shall convey copies of this ruling and order to counsel with offices located outside the District of Connecticut (including Peter L. Zimroth) by Express Mail.

It is so ordered.

Dated at Hartford, Connecticut, this 18th day of April, 1984.

/s/ José A. Cabranes

José A. Cabranes
United States District Judge

NOTES

1. An IRS summons imposes a duty to retain possession of summoned documents; thus, an individual may not defeat a summons by relinquishing possession of summoned documents. *United States v. Asay*, 614 F.2d 655 (9th Cir. 1980). Accordingly, testimony regarding nonpossession since the date of the summons is logically implied by the decision in *O'Henry's Film Works*.

2. Rule 30(b)(6), Fed.R.Civ.P. provides, in pertinent part,

[a] party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event,

the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the corporation.

3. *See, e.g., Securities and Exchange Commission v. Shapiro*, 494 F.2d, 1306, n.2 (2d Cir. 1974) (Hays, J.) ("[A]ssuming that these cases [from other circuits] still represent good law, they do not bind this court."). In this instance, the court cannot assume that *Hankins* "represent[s] good law."

Judgment, United States District Court for the District of Connecticut, May 1, 1984

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. H-82-1138

UNITED STATES OF AMERICA, *et al.*

v.

LESLIE R. BARTH, *et al.*

May 1, 1984

JUDGMENT

This action having come on for consideration of the petitioners' motion to enforce IRS summons before the Honorable José A. Cabranes, United States District Judge, and

The Court having considered the full record of the case including applicable principles of law, and the Court having filed its Ruling on Petitioners' Application for an Order of Contempt and to Enforce Order of Court and Order on April 18, 1984 granting the motion,

It is accordingly ORDERED, ADJUDGED AND DECREED that judgment be and is hereby entered in favor of the petitioners.

Dated at Hartford, Connecticut, this 1st day of May, 1984.

Judgment, United States District Court
for the District of Connecticut, May 1, 1984

SYLVESTER A. MARKOWSKI, Clerk

By /s/ Dennis P. Iavarone

Dennis P. Iavarone
Deputy-in-Charge

Ruling of the United States District Court for the District of Connecticut Denying Motion for Stay Pending Appeal, May 2, 1984

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. H-82-1138

UNITED STATES OF AMERICA *and*
PHILIP J. KENNEDY,
Special Agent, Internal Revenue Service,

Petitioners,

v.

LESLIE R. BARTH; LESLIE R. BARTH ASSOCIATES, P.C. a/k/a BARTH & RICHHEIMER, P.C.; LESLIE R. BARTH ORGANIZATION, INC.; SOUTHEASTERN REALTY ASSOCIATES, INC.; NORTH AMERICAN INVESTMENT RESOURCES, INC.; *and* BISMARK REALTY CONSULTANTS, INC.,

Respondents.

May 2, 1984

RULING ON RESPONDENTS' MOTION FOR STAY

On April 18, 1984, this court entered an order enforcing five Internal Revenue Service summonses, which requires that

> . . . Barth shall either produce the summoned corporate tax returns or testify under oath before this court that he did not possess them on the date of the summons, or at any time thereafter, at a hearing to be held on Monday, May 7, 1984 at 10:00 a.m.

* * *

Ruling of the United States District Court for the District of Connecticut Denying Motion for Stay Pending Appeal, May 2, 1984

> . . . [R]espondent corporations shall designate, and if necessary, shall appoint an agent or agents who shall, having made such inquiry as is necessary in the circumstances, appear in person on Monday, May 7, 1984, at 11:00 a.m., before the Internal Revenue Service agents at the United States Courthouse, 450 Main Street, Hartford, Connecticut, to testify for the corporations in response to the summonses, without invoking their personal privilege against self-incrimination and shall furnish such material as is available to the corporations.

On April 24, 1984, respondents moved this court to stay its order pending appeal of the order to the Court of Appeals, and filed a Memorandum in Support of Respondents' Motion for a Stay of an Order Enforcing Five Internal Revenue Service Summonses ("Respondents' Memorandum"). On April 30, 1984, the Government filed a memorandum indicating that it incorporated by reference its Memorandum in Opposition to Respondents' Motion for a Stay Pending Appeal, which had been filed December 19, 1983.[1]

Our Court of Appeals has stated that

> [a] stay pending an appeal from the denial of a motion to vacate or modify a summons under Section 7602(2) [now 7602(a)(2)] should not be granted as a matter of course, but only when there is a substantial possibility of success, and then on terms designed to expedite the appeal and, if necessary and appropriate, to protect against the running of any applicable statute of limitations.

In re Turner, 309 F.2d 69, 72 (2d Cir. 1962) (Friendly, J.). The factors to be considered in determining whether to grant the application for a stay are: (a) the strength of the applicant's showing that he is likely to succeed on the merits of the appeal; (b) the likelihood that the applicant will suffer irreparable injury unless the stay is granted; (c) a showing that no substantial harm will befall other interested persons if the stay is granted; and (d) a demonstration that a stay of the order will

Ruling of the United States District Court for the District of Connecticut Denying Motion for Stay Pending Appeal, May 2, 1984

cause no harm to the public interest. *See generally Reserve Mining Company v. United States*, 498 F.2d 1073, 1076-77 (8th Cir. 1974), *application to vacate stay denied*, 418 U.S. 911 (1974); 419 U.S. 802 (1974), *renewed application denied*, 420 U.S. 1000 (1975); *Eastern Air Lines v. Civil Aeronautics Board*, 261 F.2d 830 (2d Cir. 1958); 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2904 at 316 (1973).

I. LIKELIHOOD OF SUCCESS ON APPEAL

A. *BARTH*

Leslie R. Barth may properly assert his personal privilege against compelled self-incrimination in response to any questions concerning the whereabouts of the tax returns or the reasons for his non-possession of them. *Curcio v. United States*, 354 U.S. 118, 125 (1957). He may not, however, shelter his failure to produce the summoned corporate tax returns by claiming his personal privilege. As the Supreme Court put it in *Curcio*, "[a] custodian, by assuming the duties of his office, undertakes the obligation to produce the books of which he is custodian in response to a rightful exercise of the State's visitorial powers." *Id.* at 124. The Court of Appeals has stated that "[t]he agent's statement that he did not possess the records at issue is merely part of his duty to comply with a lawful demand for them." *United States v. O'Henry's Film Works, Inc.*, 598 F.2d 313, 318 (2d Cir. 1979).

The fact that this is a failure-to-file investigation does not alter Barth's obligations. As this court made clear in its ruling entered April 18, 1984, a statement that Barth did not possess the summoned income tax returns on the date of the summons or at any time thereafter does not logically imply that the summoned tax returns do not exist or were not filed, and is therefore not incriminating. Non-existence of the records is one possible inference from a statement of Barth's non-possession of them. But there are other possible inferences: for example, that they were in someone else's possession, or that they once existed but have been destroyed. Thus, respondents' assertion that sworn testimony to non-possession on the date of the summons or at any time

thereafter is tantamount to an admission that no tax returns were filed is simply a *non sequitur.*

Accordingly, in the court's view, the likelihood that respondents will succeed on the merits of their appeal with respect to Barth is slight.

B. *THE CORPORATIONS*

Respondents contend first, that it is impossible for them to comply with the court's order, since all persons who might have knowledge of the corporate records which were produced in response to the summonses would assert his or her own personal privilege, if called to testify, and, second, that "respondents have already demonstrated that they cannot designate a current employee to testify without invoking his personal Fifth Amendment privilege."

(i)

In a civil contempt proceeding, a defendant may assert as a defense a present inability to comply with the order in question, *United States v. Rylander,* 103 S. Ct. 1548, 1552 (1983); *Maggio v. Zeitz,* 333 U.S. 56-75-76 (1948). However, a showing that all putative corporate agents would decline to testify on grounds of the privilege against compelled self-incrimination does not necessarily constitute a sufficient basis for concluding that it is impossible to comply with the court's order. In the context of small, closely-held corporations, so to conclude would invite conspiracies to conceal; it would, in effect, permit the corporation to assert the personal Fifth Amendment privilege of its individual employees, which it is not entitled to do. In these circumstances, it is appropriate that respondent corporations bear the responsibility for designation of an agent – indeed, hiring someone if necessary, to inquire as to the information available to the corporations – in order to furnish such information as is available to the corporations, regarding the documents which have been produced pursuant to the summons, and those which have been summoned but not produced.

In that connection, the court notes that in response to the court's

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order to provide the Government with a list "of all persons who might conceivably be able to speak to these matters," *see* Certified Official Transcript of Hearing of November 22, 1982 (filed Jan. 5, 1983) at 8-9, 17, 19, 27, counsel for respondents did not supply a list of persons who may have been able to testify with respect to the summoned corporate tax returns, but only with respect to the records which have been produced by respondents. As is well-known by now in these proceedings, respondents never produced the corporate tax returns of which copies were requested in the summonses.

(ii)

As to respondents' second contention: even if the court assumes *arguendo* that a showing that all putative corporate agents would invoke their personal Fifth Amendment privileges is sufficient to establish a defense of inability to comply with the court's enforcement order, thereby precluding a finding of contempt of court, a careful examination of the record reveals that respondents have made no such showing.

In response to the court's order to provide the Government with a list "of all persons who might conceivably be able to speak to these matters," *see* Certified Official Transcript of Hearing of November 22, 1982 (filed Jan. 5, 1983) at 8-9, 17, 19, 27, counsel for respondents provided a list of names to the Government of "persons who may have had custody or some knowledge of the corporate records which have been produced by respondents pursuant to Internal Revenue summonses." The list contained seven names: David Richheimer, George Marvin-Smith, Dana Friedman, Richard Scholnick, Richard Pile-Stropher, Eileen Gravatt, and Betty Carter. *See* Letter from Sheldon H. Elsen to Steven Toscher (sometime counsel for petitioner), dated Dec. 9, 1982, appended as Exhibit 2 to Memorandum of Law of the Petitioners in Support of Their Petition for an Order and Adjudication of Contempt, attached to Petition for Order to Show Cause Why Respondents Should Not be Held in Contempt of Court and to Enforce Order of Court (filed Feb. 24, 1983). On September 16, 1983, Peter

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L. Zimroth filed an affidavit stating that he represented David Richheimer, George Marvin-Smith, Dana Friedman, Richard Scholnick, Eileen Gravatt and Betty Carter. *See* Affidavit of Peter L. Zimroth (filed Sept. 16, 1983) ¶ 1. No representations have been made on behalf of Richard Pile-Stropher, the seventh person on the list of names supplied to the Government by respondents, either in Mr. Zimroth's affidavit or, to the court's knowledge, anywhere else. *See* Certified Official Transcripts of Hearings of August 29, 1983 and December 12, 1983 (filed Sept. 21, 1983 and Dec. 19, 1983, respectively). Accordingly, a sufficient showing that respondent corporations cannot comply with the court's order enforcing the summonses has not been made. There has been no showing whatever that Richard Pile-Stropher, whom counsel for respondents represented in his letter to be a person who "may have had custody or some knowledge of the corporate records which have been produced by respondents pursuant to Internal Revenue summonses," if called to testify, would claim his personal privilege against self-incrimination.

For all of the foregoing reasons, the court concludes that it is not likely that respondents will succeed on the merits of their appeal with respect to the corporations.

II. IRREPARABLE INJURY

Respondents argue that Barth is irreparably injured the moment he is compelled to give testimony which is protected by the Fifth Amendment. While that may be true, *see, e.g., Pillsbury Co. v. Conboy*, 103 S. Ct. 608, 620 (1983) (Marshall, J., concurring) ("Any interest served by compelling the testimony is insufficient to justify subjecting the witness to the risks that attend the compulsion of incriminating testimony."), the court does not agree that testimony to non-possession of copies of federal and state corporate income tax returns on the date of the summons or at any time thereafter is incriminating with respect to the question whether corporate income tax returns were filed several years before, for the reasons set forth above. Since Barth is not irrepara-

bly injured if the testimony which is compelled is not incriminating, and it does not seem to the court that the compelled testimony is incriminating, *see* Ruling on Petitioners' Application for an Order of Contempt and to Enforce Order of Court and Order (filed April 18, 1984) at 5-6, it has not been established that irreparable injury will flow from denying a stay of the court's order of April 18, 1984.

III. NO HARM TO OTHER INTERESTED PARTIES, and
IV. NO HARM TO THE PUBLIC INTEREST

As the Government itself states, the remaining two criteria which the court must consider – lack of harm to other interested parties, and lack of harm to the public interest, are congruent in this case where the United States is a litigant. *See* Government's Memorandum at 4. The harm which the Government asserts would flow from granting a stay of the Court's order of April 18, 1984, pending appeal, is delay, which "hampers the progress of the investigation," *Id.* at 5, particularly since the statute of limitations continues to run. *Id.* at 7. Since respondents have consented to the tolling of all applicable statutes of limitations pending resolution of an appeal, *see* Respondents' Memorandum at 2, it appears to the court that no harm to other interested parties or to the public interest would accrue from granting a stay.

CONCLUSION

Respondents have invoked a fundamental and cherished principle of the United States Constitution in seeking to delay still again an investigation pursuant to which an enforcement proceeding has been pending in this court since July, 1982. However, the mere incantation of an important constitutional principle does not mean that the asserted constitutional claims have any colorable merit or otherwise warrant staying a court order to comply with well-established legal obligations. In this case, respondents have not shown that there is a likelihood that they will succeed on the merits of an appeal if a stay were granted, or that they would suffer irreparable injury if a stay were not granted. *See In re*

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Turner, supra, 399 F.2d at 72.

On balance, respondents have not made a sufficient showing that a stay of this court's enforcement order of April 18, 1984 is warranted. Accordingly, the motion for a stay of the court's order of April 18, 1984 is denied. Respondents are, of course, free to pursue their application for a stay with the United States Court of Appeals for the Second Circuit, in accordance with Rule 8(a), Fed.R.App.P.

The Clerk shall convey copies of this ruling to counsel whose offices are located outside Connecticut, as well as to Peter L. Zimroth, Esq., by Express Mail.

It is so ordered.

Dated at Hartford, this 2nd day of May 1984.

/s/ José A. Cabranes

José A. Cabranes
United States District Judge

NOTE

1. On December 12, 1983, this court entered an order in substantial conformity with the order applied for by the Government, holding respondents in contempt of court, which it vacated *sua sponte* on December 19, 1983. *See* Ruling on Petitioners' Application for an Order of Contempt and to Enforce Order of Court and Order (entered April 18, 1984) at 1-2. Before the *vacatur* of the order of December 12, 1983 was known to the parties, however, respondents moved for a stay pending appeal (filed Dec. 19, 1983), and the Government submitted a Memorandum for the Petitioners in Opposition to Respondents' Motion for a Stay Pending Appeal (filed Dec. 19, 1983). It is the memorandum filed on December 19, 1983 that the Government incorporates and asks the court to consider now.

Order of the United States District Court for the District of Connecticut Adjourning Compliance Date, May 3, 1984

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Civil No. H-82-1138

UNITED STATES OF AMERICA *and*
PHILIP J. KENNEDY,
Special Agent, Internal Revenue Service,

Petitioners,

v.

LESLIE R. BARTH; LESLIE R. BARTH ASSOCIATES, P.C. a/k/a BARTH & RICHHEIMER, P.C.; LESLIE R. BARTH ORGANIZATION, INC.; SOUTHEASTERN REALTY ASSOCIATES, INC.; NORTH AMERICAN INVESTMENT RESOURCES, INC.; *and* BISMARK REALTY CONSULTANTS, INC.,

Respondents.

May 3, 1984

ORDER

The hearings calendared in the court's order of April 18, 1984, are adjourned as follows:

1. Barth shall either produce the summoned corporate tax returns or testify under oath before this court that he did not possess them on the date of the summons, or at any time thereafter, at a hearing to be held Tuesday, May 22, 1984, at 10:00 a.m.

2. Respondent corporations shall designate, and if necessary shall appoint, an agent or agents who shall, having made such inquiry as is necessary in the circumstances, appear in person on Tuesday, May 22,

Order of the United States District Court for the District of Connecticut Adjourning Compliance Date, May 3, 1984

1984, at 11:00 a.m., before the Internal Revenue Service agents at the United States Courthouse, 450 Main Street, Hartford, Connecticut, to testify for the corporations in response to the summonses, without invoking their personal privileges against self-incrimination, and shall furnish such information as is available to the corporations.

3. The Clerk shall set down on the calendar a hearing for Wednesday, May 23, 1984 at 10:00 a.m. If any of the respondents have not complied with their legal obligations as set forth in the court's order of April 18, 1984, with the dates modified by this order, the Court will not hesitate to enter findings of contempt and impose appropriate sanctions upon a renewed application by the Government at that time.

4. Leslie R. Barth shall be present in person at the hearings scheduled for May 22 and May 23, 1984.

The Clerk shall convey copies of this order to counsel with offices located outside the District of Connecticut, and also to Peter L. Zimroth, Esq., Kostelanetz & Ritholz, 80 Pine Street, New York, N.Y. 10005, by Express Mail.

It is so ordered.

Dated at Hartford, Connecticut, this 3d day of May 1984.

/s/ José A. Cabranes

José A. Cabranes
United States District Judge

Order of the United States Court of Appeals for the Second Circuit Granting Motion for Stay, May 15, 1984

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Number 84-6131

UNITED STATES OF AMERICA, *et al.*,

Appellees,

v.

LESLIE R. BARTH, *et al.*,

Appellants.

May 15, 1984

ORDER

IT IS HEREBY ORDERED that the motion for stay is granted until appeal is heard. Appellant shall file the record, brief and joint appendix on or before 5/18/84. Appellee shall file a brief on or before 5/25/84. Appeal shall be argued during the week of June 4, 1984.

Elaine B. Goldsmith, Clerk

By: /s/ Edward J. Guardaro

Edward J. Guardaro, Deputy Clerk

May 15, 1984 Before: Hon. Richard J. Cardamone
Hon. George C. Pratt
Hon. Daniel M. Friedman

Circuit Judges

Order of the United States Court of Appeals for the Second Circuit Granting Motion for Stay of the Mandate Pending Application for Certiorari, October 22, 1984

UNITED STATES COURT OF APPEALS for

THE SECOND CIRCUIT

Docket Number 84-6131

UNITED STATES OF AMERICA, *et al.*,

Appellees,

v.

LESLIE R. BARTH, *et al.*,

Appellants.

ORDER

IT IS HEREBY ORDERED that the motion be and it is hereby granted.

/s/ Ellsworth A. Van Graafeiland per GCP

/s/ George C. Pratt

Circuit Judge

October 22, 1984

United States Constitution, Amendment IV

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

26 U.S.C. §7604, Enforcement of Summons

§7604. Enforcement of summons

(a) Jurisdiction of district court.—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

(b) Enforcement.—Whenever any person summoned under section 6420(e) (2), 6421(f) (2), 6427(h) (2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.

(c) Cross references.--

(1) Authority to issue orders, processes and judgments.—

For authority of district courts generally to enforce the provisions of this title, see section 7402.

(2) Penalties.—

For penalties applicable to violation of section 6420(e) (2), 6421(f) (2), 6424(d) (2), 6427(h) (2), or 7602, see section 7210.